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Experts: Jailing of 3 lawyers improper

Judge made ruling in diet-drug case

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Three national experts on judicial ethics said yesterday that a federal judge acted improperly Friday when he ordered the lawyers in Kentucky's fen-phen case thrown in jail after saying "the whole legal profession is on trial."

Judge William O. Bertelsman said during a hearing in U.S. District Court in Covington that if the three attorneys, charged with bilking clients out of \$46 million, were allowed to remain free while their criminal trial was continued, "it's going to look like we're all in some kind of conspiracy together, and that is not the case -- at least it's not with me," according to a copy of the hearing transcript obtained by The Courier-Journal.

At the request of suspended lawyers Shirley Cunningham Jr., William Gallion and Melbourne Mills Jr., Bertelsman continued their criminal trial from October to January, but he ordered them confined until then. They had been free on their own recognizance and are now in the Boone County Jail.

Attorneys for Gallion and Cunningham filed a notice of appeal yesterday, and Mills' lawyer said he was working on one.

Hofstra University law professor Monroe Freedman, who reviewed a copy of the transcript, said: "I have no sympathy for these lawyers, but there is only one purpose for pretrial detention, and that is to make sure defendants will appear again, not to make an example of them for image purposes."

Professor Steven Lubet of Northwestern University said: "The individuals are on trial, not the entire profession. The individual defendants, whether they are innocent or not, are entitled to individual justice."

Professor Steven Gillers of New York University said Bertelsman should have just denied the request for a continuance, which he noted judges do all the time.

The professors also said it is extremely unusual to revoke bond entirely for defendants charged with economic crimes, especially when, as in this case, they already had surrendered their passports and have appeared for several hearings after being released.

But Lexington lawyer Angela Ford, who represents more than 400 of the attorneys' former clients in a settlement involving the diet drug fen-phen, said Bertelsman was "right on target" in demanding a quick trial. "The case is very simple, and the real evidence needed to prove the case is not voluminous."

Ford said Bertelsman took the only step he could to make sure the defendants don't send the missing money abroad.

Appointed in 1979 by President Jimmy Carter, Bertelsman was honored in 2004 with the American Inns of Court professional award -- for senior judges and lawyers in Kentucky, Tennessee, Michigan and Ohio "whose life and

practice display sterling character and unquestioned integrity."

The hearing transcript shows Bertelsman was frustrated by delays in the criminal case, in which the lawyers are charged with wire fraud, and in a related civil case in state court in which they already have been found to have defrauded 440 clients of \$64 million in the \$200 million settlement of the diet-drug litigation.

When one of Cunningham's criminal lawyers, Stephen Dobson III of Tallahassee, Fla., said he wasn't familiar with the details of the civil case, Bertelsman responded: "If I were you, I'd get familiar with it."

When Dobson and other defense lawyers said they needed time to review 200,000 documents that filled 114 boxes and took three weeks to copy, Bertelsman insisted that the case could be tried with 10 documents, in one week.

"You might have a warehouse full of documents, but I don't see why they would be relevant," he said. "It's a pretty simple case factually, although it may be an awful lot of money."

Bertelsman noted that the state court civil trial, in which former clients are seeking punitive damages, already has been delayed "waiting for us, and I am committed to the proposition they're not going to have to wait all that long."

He then warned the lawyers that "if I've got to continue this trial date, I'm going to revoke the defendants' bonds, so you decide what you want to do."

After a 10-minute recess, Bertelsman said: "Let me try to tell you folks where I'm coming from. In my opinion, not only these three gentlemen are on trial ... the profession's on trial. The judiciary's on trial. We're all on trial. ... So what will it be?"

The lawyers' counsel continued to argue for a continuance, joined by Assistant U.S. Attorney Laura Voorhees, who said she worried that convictions might be reversed if the counsel didn't have proper time to prepare.

But Bertelsman wasn't convinced. Noting that the defendants are all 50 to 70 years old and face 20 years apiece in prison, he said "there's tremendous temptation, incentive to stall."

Then he revoked their bond and ordered the marshal to take them away.

"I told you what I was going to do," Bertelsman said. "You didn't listen."

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